***United States Court of Appeals***

***for the Second Circuit***


# PETITIONER'S BRIEF

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

76-4253

Nos. 75-4044, 76-4253

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

JAMES K. STERRITT, INC., AND
CONCRETE HAULERS, INC.,

Respondent,

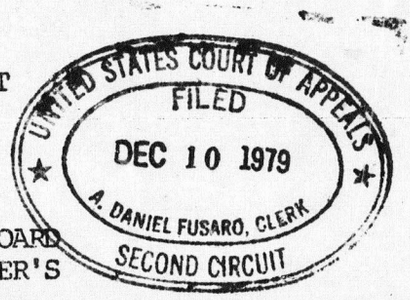
and

STERRITT TRUCKING, INC., AND
JAMES K. STERRITT,

Additional Respondents
in Contempt.

B
P/S

ON THE BOARD'S MOTION FOR
ADJUDICATION IN CIVIL CONTEMPT
AND FOR OTHER CIVIL RELIEF




BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD
IN SUPPORT OF THE SPECIAL MASTER'S
REPORT AND RECOMMENDATIONS

## COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether the Special Master was clearly in error in finding respondents in contempt of two judgments of the Court requiring, inter alia, certain affirmative action, including payment of backpay to certain discriminatees.

## COUNTERSTATEMENT OF THE CASE

### Preliminary Statement

The proceedings were commenced in this Court on August 31, 1977, when the National Labor Relations Board moved the Court for an order adjudging James K. Sterritt, Inc., Concrete Haulers, Inc. ("JKS/CHI"), Sterritt Trucking, Inc. ("STI") and James K. Sterritt in contempt of October 15, 1975 and December 30, 1976 judgments of the Court for refusing to pay backpay sums and other payments to named discriminatees.

Thus, on October 17, 1975, the Court enforced from the bench a Decision and Order of the Board (215 NLRB 769), finding that JKS and CHI were alter egos, and that JKS/CHI and additional respondent in contempt STI were all together a single employer within the meaning of the National Labor Relations Act (hereafter, "the Act") and were all effectively owned and controlled by additional respondent in contempt James K. Sterritt. Inter alia, JKS/CHI, "its officers, agents, successors, and assigns" were ordered to:

> Offer to Alfred Finch, Albert Quick, Sr., Frank K. Ruhnke, Thomas F. Monteverde, Jr., Robert Quick, Edward Jordan, Jr., and Paul D. Overbaugh immediate and full reinstatement to their former jobs, or, if such jobs no longer exist, to substantially equivalent jobs and make them whole in the manner set forth in the section of the Board's Decision entitled, "The Remedy."

On December 30, 1976, the Court entered a supplemental judgment enforcing a June 18, 1976 unreported supplemental order of the Board fixing the amounts of backpay due each of the aforesaid discriminatees and requiring that JKS/CHI, its officers, agents, successors, and assigns

> make whole each of the discriminatees named below by payment to each of them the amount set fortn adjacent to his name, plus interest accrued at the rate of 6 percent per annum in the manner prescribed in Isis Plumbing & Heating Co., 138 NLRB 716 (1962), until all backpay is paid, less the tax withholding required by Federal and state laws:
>
> | | |
> |---|---|
> | Robert Quick | $10,028 |
> | Thomas Monteverde, Jr. | 19,419 |
> | Edward Jordan, Jr. | 11,842 |
> | Allen Finch | 13,758 |
> | Paul D. Overbaugh | 7,067 |
> | Albert Quick, Sr. | 7,770 |
> | Frank K. Ruhnke | 9,509 1/ |

The Board's motion alleged that respondents had violated these Court decrees by failing and refusing to pay the amounts due. On November 27, 1977, the Court appointed Bender Solomon, United States Magistrate for the Northern District of New York, as Special Master to hear evidence and make recommended findings and conclusions of law. The respondents filed an answer to the Board's motion denying the alleged disobedience of the judgments. Evidence was taken on September 12 and 13, 1978, and on July 19, 1979 the Special Master issued his report, sustaining the Board's assertion that respondents were in contempt. On October 11, 1979, respondent filed exceptions to the report and thereafter

1/ In addition, the judgment required respondents to pay specified amounts to the Teamsters' pension fund on behalf of the discriminatees (A. 3).

filed a brief in support. This case is now before the Court on the exceptions to the Master's report. The Board urges the Court to adopt all of the Master's findings, and urges entry of an order incorporating all of the Master's recommended remedies.

## I. THE MASTER'S FINDINGS OF FACT

The Special Master's findings are summarized below:

As also found in the earlier unfair labor practice proceeding, prior to January 31, 1974, James K. Sterritt performed trucking operations through JKS, a corporation he controlled. At the same time, STI, another Sterritt-controlled corporation, existed as the holder of interstate and intrastate licenses under which Sterritt conducted his trucking operations; STI had no employees and performed no other operations (A. 20). However, Sterritt's trucking customer, Span Crete, made payments to STI, the holding company, which turned over all the payments to JKS, the trucking company (A. 20). On January 31, 1974, JKS ceased operations and the following day all the operations theretofore conducted by JKS were conducted by CHI, under Sterritt's control (id.). Thereafter, operations were conducted for the same customer using the same equipment as JKS out of the same terminal with the same employees, except that CHI refused to employ the discriminatees referred to above, because they exercised rights guaranteed by Section 7 of the Act (supra, p. 2).

In October 1975, this Court entered a judgment enforcing an order of the Board finding, inter alia, that the refusal to rehire these discriminatees violated Section 8(a)(3) of the Act, and requiring JKS/CHI

and "its officers, agents, successors and assigns" to make the discriminatees whole for any loss of pay they suffered (A. 26-27). Subsequently, Sterritt continued his business solely under the name of STI, a successor to the former operation. STI was in existence at the time of this hearing (A. 21, 30).

On December 30, 1976, the Court entered a supplemental judgment enforcing an unreported Board order fixing the amounts of backpay and other payments due to the discriminatees. In the order, JKS/CHI, and its officers, agents, successors and assigns were required to pay the discriminatees (A. 27). However, at all times since entry of the judgments, the respondents have contumaciously disobeyed the backpay provisions thereof and to date have not satisfied any portion of the make whole provisions of the judgments (A. 30).

## II. THE MASTER'S CONCLUSIONS AND RECOMMENDATIONS

On the foregoing facts the Special Master found (A. 21) inter alia, that JKS/CHI and STI "are a single enterprise and employer, and that STI, as the continuation of that enterprise is along with the controlling stockholder, Sterritt himself, liable for the outstanding backpay debt." The Master also found that all of the respondents including JKS and Sterritt had contumaciously refused to satisfy any part of the outstanding backpay obligation (A. 30).

In purgation of their contempt the Special Master recommended that respondents and any successors or alter egos be required to fully comply with the Court's judgments, including backpay; to mail to employees of

the corporate respondents copies of notices stating that they have been found in contempt, and to post those notices; and to pay to the Board its costs and expenses, including attorney's salaries, incurred by the Board in this contempt proceeding. Further, the Special Master recommended that the Court assess a prospective fine of $500 per day so long as full compliance is not forthcoming, and that upon a failure of purgation by respondents, the Court issue attachment against Mr. Sterritt and other persons responsible for noncompliance. Finally, the Special Master recommended "that the Court take such other and further action as may be just, reasonable and necessary to assure compliance with its judgments."

## ARGUMENT

### THE FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF THE SPECIAL MASTER ARE NOT CLEARLY ERRONEOUS AND SHOULD BE AFFIRMED IN FULL BY THE COURT

#### A. The Standard on Review

The question for decision in this contempt proceeding is simply whether there has been non-compliance with the Court's judgments. McComb v. Jacksonville Paper Company, 336 U.S. 187, 191 (1949). The pertinent terms of the 1975 judgment and 1976 supplemental judgment require JKS/CHI, and its "officers, agents, successors and assigns" to make whole certain named discriminatees by paying to them monetary amounts (now liquidated) as backpay for wages lost by reason of the discrimination against them.

As discussed above, the Special Master appointed by the Court found that respondents had in fact failed to comply with any portion of the make

whole remedy and recommended that all of them be held in contempt. Inasmuch as the Court has entrusted adjudication of this case to the Special Master in the first instance, his report should be accepted by the Court unless it is clearly erroneous. N.L.R.B. v. J.P. Stevens & Co., Inc., 563 F. 2d 8, 14 (2nd Cir. 1977), and cases there cited. Moreover, the Union, as the party excepting to the Master's findings "carries the burden of proving them to be clearly erroneous." Oil Chemical & Atomic Workers v. N.L.R.B., 547 F. 2d 575, 580 (D.C. Cir. 1976), cert. denied, 431 U.S. 966. Accord: N.L.R.B. v. J.P. Stevens, Inc., supra, 563 F. 2d at 14.

The Special Master found, and respondents do not deny, that no part of the backpay or other payments plus interest due the discriminatees has ever been paid or tendered. Further, the Master's factual findings of noncompliance are essentially uncontested. Hence, respondents have not shown the Master's findings to be clearly erroneous, and the findings are entitled to adoption in toto absent reasons which compel a different result. As we now show, respondent's have failed to excuse or justify their noncompliance in any respect.

B. Respondents' Contentions

In opposition to these findings and recommendations, respondents argue (Br. 5-6) that STI and Mr. Sterritt himself "are not subject to the back pay order" because there "is not a sufficient connection" between JKS/CHI (named in earlier proceedings) and these additional respondents to warrant attaching liability of the former to the latter. Further, respondents assert (Br. 6-7) that the Board conceded as much at the hearing, and that

the Special Master has made a sub silentio finding to this effect. We now demonstrate that there is no merit in either contention.

First, it is well established that in contempt proceedings "liability for compliance with a judicially enforced unfair labor practice order may be imposed upon parties not themselves charged in the initial proceedings." N.L.R.B. v. C.C.C. Associates, Inc., 306 F. 2d 634, 539 (1962). As to corporations like STI, liability arises where "corporations are not what they appear to be . . . but divisions or departments of a 'single enterprise,'" in which case, "jurisdiction over the affiliated corporation would exist in contempt proceedings." N.L.R.B. v. Deena Artware, 310 F. 2d 470, 474 (C.A. 6, 1962), upon remand from U.S. Supreme Court, 361 U.S. 398 (1960). And individuals are, "no less than the corporation itself, . . . guilty of disobedience, and may be punished for contempt" "if they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty...." Wilson v. U.S., 221 U.S. 361, 376 (1911). See: N.L.R.B. v. Hopwood Retinning Co., 104 F. 2d 302 (C.A. 2, 1939); Parker v. U.S., 126 F. 2d 370, 379-380 (C.A. 1, 1942). See also, N.L.R.B. v. Johnson Mfg. Company of Lubbock, 511 F. 2d 153, 156 (C.A. 5, 1975); N.L.R.B. v. Trans Ocean Export Packing, Inc., 473 F. 2d 612, 617-618 (C.A. 9, 1973).

As indicated above, whether STI is itself subject to contempt findings depends on whether STI and JKS/CHI are a "single enterprise." Thus, separate corporate entities are in fact one, where together there

is "interrelation of operations, common management, centralized control of labor relations, and common ownership." Radio Union v. Broadcast Serv., 380 U.S. 255, 256 (1965). And see, for example: N.L.R.B. v. A. E. Nettleton Co., 241 F. 2d 130, 131 (C.A. 2, 1957); N.L.R.B. v. Triumph Curing Ctr., 571 F. 2d 462, 468 (C.A. 9, 1978); N.L.R.B. v. C. K. Smith & Co., Inc., 567 F. 2d 162, 164 (C.A. 1, 1977); L. 644, U.B. of Carpenters, Etc. v. N.L.R.B., 533 F. 2d 1136, 1142 (C.A.D.C., 1975); N.L.R.B. v. R. L. Sweet Lumber Company, 515 F. 2d 785, 793 (C.A. 10, 1974).

That STI and JKS/CHI met each of these criteria is hardly open to argument. As to the Board previously found (215 NLRB at 769) and as the Special Master confirmed in his Report (A. 20):

> James K. Sterritt is the principal operating officer of JKS, CHI, and [STI]. Mr. Sterritt is the president of JKS and STI and the general manager of CHI. He has effective control over the stock in all three corporations. STI has interstate and interstate operating authorities as a carrier which are possessed by neither JKS or CHI. The services furnished by JKS are furnished pursuant to the authority held by STI which has no employees and itself performs no operations. On January 31, 1974, JKS ceased operations and the following day all the operations theretofore conducted by JKS were conducted by CHI....All payments from Span-crete for the services rendered by Sterritt's enterprises are made through STI which prior to February 1, 1974, turned over all of the money to JKS and since February 1, 1974, to CHI. Sterritt through this period has been the sole operating authority of both JKS and CHI. The operations were conducted for the same customer using the same equipment out of the

> same terminals and using, with the exception of [the discriminatees], the same personnel. I find that JKS, STI, and CHI are all together a single employer within the meaning of the Act and that CHI is an alter ego of JKS.

On the basis of the entire record, including "the admission by STI and Sterritt and . . . JKS and CHI in the answer that Sterritt individually always had control of these three corporations," the Special Master found that the three corporations shared a single employer status (and see respondents' brief, p. 6). In light of these findings, the bare assertion by respondents to the contrary is not entitled to weight.

Regarding the liability of Mr. Sterritt himself, it is clear, as indicated above (pp. 4, 9), that he has virtually exclusive control of the affairs of each of the corporations, and as their guiding officer always had and has the duty to bring respondents into compliance with the judgments against them (see N.L.R.B. v. Trans-Ocean Export Packing, Inc., supra, 473 F. 2d at 618; and see cases cited supra, p. 8). Respondents have not shown that the employing enterprise has not had the ability to comply fully. Accordingly, Sterritt should be held in contempt for his lengthy refusal to obey the affirmative backpay provisions.

The remaining contention--that the Board admits its failure to establish a sufficient connection between the corporate wrongdoers and Sterritt/STI to require satisfaction of the backpay by them--is wholly groundless. The Board hereby asserts that the connection has been thoroughly proved (see discussion, supra, pp. 8-9). Moreover, as we

have explained (supra, p. 8), STI's and Sterritt's liability follow from the existence of a single economic enterprise, and from their status as "officers, agents, successors and assigns" of JKS/CHI. Further, the mid-hearing statement of Board counsel upon which respondents rely in asserting that "the NLRB does not seek enforcement against the general assets of James K. Sterritt" (Br. 5) cannot be taken as an admission that Sterritt is not liable for backpay. Thus, in response to a request from the Special Master for the Board's position regarding Sterritt's "personal assets," counsel stated (A. 45) that the Board was not attempting to collect the backpay "from the personal property or assets of Mr. Sterritt . . . ." This statement is not inconsistent with the Board's position, as explicated before the Master and here that as the dominant officer of the corporations, Sterritt subjected himself to derivative liability for the backpay by failing and refusing to cause the corporations to comply with the judgment and that both the corporations and Sterritt be required to liquidate the backpay indebtedness in purgation of their contempt.

Moreover, the Special Master's rejection of certain of the Board's proposed findings regarding the interrelationship of respondents (A. 29-30) does not imply, as respondents suggest, that the Master rejected the "single employer" concept. For it is clear that the Master conducted his own analysis and substituted his own findings, which reached the same

conclusion (A. 20-21). The fact that the Special Master elected to cast his findings in his own words, does not alter the fact that the Board prevailed before the Master in every important respect. 1/

## CONCLUSION

For the foregoing reasons, we respectfully submit that the Special Master's Report and Recommendations should be accepted in its entirety, and that the Court should enter an order adjuding respondents in contempt as recommended by the Special Master.

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Dated: December 7, 1979

1/ The interlineated bracketing of certain portions of the Board's proposed findings, as they are reproduced in the Appendix (Finding 7 (A. 29)) and Finding 9 (A. 30)), should not be accepted as the Special Master's markings, since the brackets do not appear on the original report filed by the Special Master and accordingly should be disregarded by the Court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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|---|---|---|
| NATIONAL LABOR RELATIONS BOARD,<br><br>Petitioner,<br><br>v.<br><br>JAMES K. STERRITT, INC., and<br>CONCRETE HAULERS, INC.,<br><br>Respondents,<br><br>and<br><br>STERRITT TRUCKING, INC., and<br>JAMES K. STERRITT,<br><br>Additional Respondents<br>in Contempt. | : | No. 75-4044 and<br>76-4253 |

CERTIFICATE OF SERVICE

The undersigned hereby certify that two copies of the Board's BRIEF IN SUPPORT OF THE SPECIAL MASTER'S REPORT AND RECOMMENDATION in the above-captioned case has this day been served by first class mail upon the following counsel listed at the address below:

Arthur F. McGinn, Jr., Esq.
Ninety State Street
Albany, New York 12207

Dated at Washington, D.C.
this 7th day of December 1979.

Paul Elkind

PAUL ELKIND,
Assistant General Counsel
for Contempt Litigation